

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DENISE ROBERSON,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner,
Social Security Administration,

Defendant.

Case No. C07-391RSL

ORDER REVERSING &
REMANDING CASE

The Court, having reviewed plaintiff's complaint (Dkt. #4), the parties' briefs (Dkt. #13, 17, and 18), the Report and Recommendation (Dkt. #19) of the Honorable James P. Donohue, United States Magistrate Judge, plaintiff's objections to the Report and Recommendation (Dkt. #20), and the remaining record, does hereby find and ORDER:

- (1) The Court adopts the Report and Recommendation.
- (2) Plaintiff challenges the Report and Recommendation's analysis concerning the post-hearing declarations of treating physician Sonia E. Hernandez, M.D. Dkt. #20 at 5-7. Recognizing that the Administrative Law Judge ("ALJ") erred in discounting Dr. Hernandez's declarations as not sworn under oath, Magistrate Judge Donohue correctly recommended remanding this issue for further

proceedings “to ensure that Dr. Hernandez’s complete and unfiltered medical opinions are considered” (Dkt. #19 at 7). The Report and Recommendation properly observed that other information in the record might provide a valid basis for the conclusion that the treatment notes merited greater weight than the post-hearing declarations. See id. at 7-8. Plaintiff cites Reddick v. Chater, 1557 F.3d 715, 726 (9th Cir. 1998), and Nguyen v. Chater, 100 F.3d 1462 (9th Cir. 1996), for the proposition that the purpose and manner in which the declarations were obtained do not constitute sufficient reasons for rejecting them. These cases are factually distinguishable, however. Unlike Reddick and Nguyen, where the ALJ rejected the treating doctors’ reports, the ALJ in this case accepted the treating doctor’s treatment notes. See Administrative Report at 40-41. The ALJ found Dr. Hernandez’s treatment notes more credible than the post-hearing declarations. Id. at 43. The ALJ also accorded weight to information from plaintiff’s prior treating physician Dr. Medina and treatment notes from a wound-care center. Id. at 42-43. Nor do Reddick and Nguyen prohibit considering the purpose and manner in which the declarations were obtained as part of evaluating their credibility, as long as the fact that the declarations were drafted for the disability determination does not form the entire basis for the credibility determination. See Reddick 1557 F.3d at 726. Additional reasons, such as inconsistency with treatment notes and ambiguous wording, can create a valid basis for rejecting the declarations. Id. As long as the ALJ provides cogent and specific reasons based on the record and demonstrates that the declarations were fully considered, the purpose of the declarations may also be considered.

- (3) Arguing that the Commissioner cannot satisfy the burden at step five of identifying jobs existing in significant numbers that plaintiff can perform, plaintiff requests

1 that the Court direct an award of benefits.¹ Dkt. #20 at 4-5. Plaintiff contends that
2 (1) the approximately 260 jobs statewide suggested by the vocational expert (VE)
3 do not amount to a significant number, and (2) the VE relied on a hypothetical for
4 sedentary capacity not including the sit/stand option required for plaintiff's
5 residual functional capacity, and therefore the number of jobs would only decrease
6 upon remand. Id. at 5. At step five, the Commissioner must identify work that
7 "exists in significant numbers either in the region where such individual lives or in
8 several regions of the country." 42 U.S.C. § 423(d) (2) (A). On the other hand,
9 the existence of only a few "isolated jobs" will not support a finding of work
10 existing in significant numbers. Walker v. Matthews, 546 F.2d 814, 819 (9th Cir.
11 1976). Supplemental testimony from the VE is necessary to sufficiently establish
12 the specific job-incidence in the regional and national economy. It is unclear
13 whether the VE included the sit/stand option in the final estimate of "at least 200"
14 cashier positions and "over 50" security guard monitor positions statewide. See id.
15 at 778 and 787. In an earlier reference to booth parking lot cashier positions, the
16 VE explicitly included consideration of a sit/stand option. AR at 772. Upon
17 remand, the ALJ must solicit from the VE the specific incidence of work matching
18 plaintiff's residual functional capacity, including full consideration of the need to
19 alternate sitting and standing per the ALJ's finding (id. at 39). Because this would
20 not necessarily reduce the number of existing jobs, remand for further proceedings
21 is appropriate.

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25 ¹The Court recognizes that plaintiff sought judicial relief under sentence four, and not sentence
26 six, of 42 U.S.C. § 405(g). This does not, however, alter the availability of the remedy chosen by the
27 Magistrate Judge in this case.

- 1 (4) For all of the foregoing reasons, the final decision of the Commissioner is
2 REVERSED, and this case is REMANDED to the Social Security Administration
3 for further proceedings not inconsistent with the Report and Recommendation.
4 (5) The Clerk shall send copies of this Order to the parties and to Magistrate Judge
5 Donohue.
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7 Dated this 13th day of February, 2008.
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10 Robert S. Lasnik
11 United States District Judge
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